

THIS NOTICE is signed and sealed for the Court of Queen's Bench of New Brunswick by the Clerk of the Court at Moncton on the 17 day of January, A.D., 2013.



ANNE M. RICHARD, CLERK OF THE COURT
THE MONCTON LAW COURTS
145 ASSUMPTION BLVD., PO Box 5001
MONCTON, NEW BRUNSWICK E1C 8R3

Court Seal

STATEMENT OF CLAIM

CAPACITY OF ALL PERSONS WHO ARE PARTIES TO THE PROCEEDING

1. The Plaintiff, Elizabeth Tracy, is an adult person of full legal capacity, and is the natural Mother of the minor Plaintiffs Elexi Tracy, Drew Tracy and Addison Tracy.
2. The Plaintiff Shawn Tracy is an adult person of full legal capacity and the natural Father of the minor Plaintiffs Elexi Tracy, Drew Tracy and Addison Tracy.
3. The Plaintiffs, Elexi Tracy (born October 24th 2002, presently 10 years of age); Drew Tracy (born April 30th 2004, presently 8 years of age); and Addison Tracy (born October 3rd 2006, presently 6 years of age) are presently minors and are represented herein by the Plaintiff Shawn Tracy, their Litigation Guardian, pursuant to Rule 7 of the *Rules of Court*.
4. The Defendant Magic Mountain Ltd is a body corporate duly incorporated pursuant to the laws of New Brunswick, and operates under the business name and style of Magic Mountain Water Park, situate at Magnetic Hill, at or near Moncton, New Brunswick. The Defendant has its head office and place of business at 2875 Mountain Road, Moncton, New Brunswick, E1G 2W7.

THE PLACE OF RESIDENCE OF THE PLAINTIFF

5. The Plaintiffs Elizabeth Tracy and Shawn Tracy are husband and wife, and reside with each other at 11 Landsdowne Court in the Town of Riverview, County of Albert and Province of New Brunswick, E1B 3E5.
6. The Plaintiffs Elexi Tracy, Drew Tracy and Addison Tracy are minor children and reside with their natural parents, Plaintiffs Elizabeth Tracy and Shawn Tracy, at 11 Landsdowne Court in the Town of Riverview, County of Albert and Province of New Brunswick, E1B 3E5.

WHERE THE STATEMENT OF CLAIM IS TO BE SERVED OUT OF NEW BRUNSWICK WITHOUT LEAVE, THE FACTS UPON WHICH IT IS ALLEGED THAT SUCH SERVICE IS PERMITTED

7. Not Applicable.

EACH ALLEGATION OF A MATERIAL FACT RELIED UPON TO SUBSTANTIATE THE CLAIM

8. The Plaintiffs Elizabeth Tracy and Shawn Tracy are adult persons who married to each other. They have three daughters namely Elexi (currently age 10), born October 24th 2002; Drew (currently age 8) born April 30th 2004; and Addison (currently age 6) born October 3rd 2006.
9. On or about Sunday, July 29th 2012 at approximately 9:45am, the Tracy family arrived at the Defendant's location known as "Magic Mountain Water Park" in anticipation of the park's scheduled opening at 10:00am.
10. The weather that day was sunny and clear.
11. Mr. and Mrs. Tracy purchased a 'Day Pass' package for the entire family, and were instructed by park employees to wait outside the main area of the park until such time as a last minute 'safety inspection' was completed.
12. At or about 10:00am, the 'all clear' horn blew and patrons were then allowed to enter into the park itself.
13. One of the couple's daughters, Drew Tracy, was attracted to a ride known as the "Torpedo", so-called.
14. The family followed her, and it was decided that this would be the first ride they participate in that day.
15. Mrs. Tracy removed her dress, shoes and sunglasses, and, clad in her bathing suit, followed her daughter, Drew, to the bottom of the 'Torpedo' ride, so-called. Elizabeth Tracy and her daughter Drew climbed the stairs of this ride and were greeted by two young male employees at the top. At this point, Elizabeth Tracy and her daughter, Drew would have been the equivalent of at least two storeys up from the ground.
16. Elizabeth Tracy's daughter Drew was somewhat nervous and apprehensive of the ride and consequently Elizabeth Tracy volunteered to be the first to go down the ride in order to reassure her.
17. Following the defendant employees' instructions, the Plaintiff Elizabeth Tracy positioned herself at the top of the ride, and was enclosed in a cabinet. Just prior to closing the cabinet door, an employee instructed Mrs. Tracy to cross her legs and put both hands behind her back. The employee then performed a 'count down' with his fingers as in "3, 2, 1" at which point the platform underneath the Plaintiff Elizabeth Tracy's feet released.

18. Elizabeth Tracy then plummeted straight down the 'Torpedo' ride to its bottom and then leveled off to a horizontal position. As her body was leveling off to a horizontal position, her feet suddenly and without warning struck a solid wood or plastic surface at a very high rate of speed.
19. Immediately following the impact, Elizabeth Tracy felt a very high level of pain in her legs. She tried to sit up and at this point noticed that her right leg was very badly deformed and misshapen. She then went into shock.
20. The Plaintiff Shawn Tracy was standing at the bottom of the ride, and witnessed the accident. A male employee of Magic Mountain was standing beside him.
21. Immediately after the incident, one of the male employees who was standing at the top of the ride yelled to the male employee standing beside Shawn Tracy words to the effect "...what happened...?"
22. The employee at the bottom standing beside Mr. Tracy replied words to the effect "...we didn't fill the pool at the bottom..."
23. Very shortly afterwards a female employee (apparently a supervisor) approached Shawn Tracy and explained to him "...there wasn't enough water to stop her..."
24. At the time of this fall, Mrs. Tracy's daughter Drew was still standing at the top of the Torpedo ride; while the rest of her family, namely her husband Shawn Tracy and her two other daughters, Elexi and Addison, were standing at the bottom of the slide, and were immediate eye witnesses to the impact and the injuries incurred by Elizabeth Tracy.

Negligence of Defendant, Magic Mountain Ltd

25. Immediately following Elizabeth Tracy's fall and injury, the Plaintiff Shawn Tracy overheard a park employee to exclaim that employees had neglected to ensure that there was an adequate cushion of water at the bottom of this amusement ride in order to cushion the fall of Elizabeth Tracy, or any other patron of this ride.
26. The Plaintiffs state that the employees of the Defendant wore distinctive coloured shirts with a 'Magic Mountain' insignia emblazoned thereon. Some employees had walkie-talkies, and both Elizabeth Tracy and her family paid close attention to any kind of instructions and directions that were given to them by the employees.
27. It now appears that an unknown employee of Magic Mountain Ltd neglected to release the main water valve to the park that furnishes high volumes of water throughout the park, not only to the ride in question, but to other rides and amusement areas in general.
28. The Plaintiffs also learned that later that same day of the accident, the ride in question was in fact up and operational once again and accepting patrons. By this time it appears as though the main water valve had been activated and that an appropriate volume of water was flowing under the ride so as to cushion the vertical drops of subsequent customers.

29. The Plaintiffs state that the above-noted injuries to Elizabeth Tracy were occasioned solely as a result of the negligence of the Defendant, Magic Mountain Ltd, and its employees, for whom Magic Mountain Ltd is vicariously liable, particulars of which negligence include:
- (i) failing to instruct, train and direct employees to operate the amusement ride in such a manner to ensure the safety of any and all patrons of the Defendant, including the Plaintiff, Elizabeth Tracy;
 - (ii) failing to adequately inspect the amusement ride or the area surrounding the amusement ride in order to ensure that the situation was completely safe for patrons such as Elizabeth Tracy to participate in same;
 - (iii) failing to inspect the area in question to ensure that there was an adequate water cushion at the bottom of said amusement ride in order to safely cushion the descent of the Plaintiff Elizabeth Tracy;
 - (iv) failing to otherwise employ appropriate safety measures to prevent injury and harm to any user of the water park including the Plaintiff Elizabeth Tracy;
 - (v) failing to activate the main water valve that would have released an appropriately large volume of water to the bottom of this ride (and to other parts of the amusement park) such that the water could serve to cushion the vertical drop of the Plaintiff and/or other patrons using this amusement ride;
 - (vi) failing to keep abreast of industry development and/or to install such devices which would have improved the safety of the ride in question;
 - (vii) such other and further particulars of negligence as may come to the attention of the Plaintiff.

Injuries of Elizabeth Tracy

30. The Plaintiff Elizabeth Tracy was seriously injured in the above-noted accident, and incurred multiple fractures of her right leg including her right femur, tibial plateau, talus and ankle.
31. As a result of the above-noted injuries, Elizabeth Tracy was hospitalized and underwent a series of orthopedic surgeries in order to perform an open reduction of the multiple fractures described above. Mrs. Tracy then developed complications as a result of these surgeries and corrective surgery was required.
32. Mrs. Tracy had to be fitted with a rigid cast from her toes to halfway up her calf, and also had to be fitted with an external extensor brace on her right leg.
33. Mrs. Tracy faces further surgery to her knee and ankle; and will have to undergo a very lengthy and extensive convalescence and rehabilitative process.
34. The above-noted injuries have resulted in the following damages to the Plaintiff, Elizabeth Tracy:
- ~ Pain and Suffering and Loss of Enjoyment of Life;
 - ~ Absence from Employment;
 - ~ Loss or Diminution of Past, Present and Future Earnings;
 - ~ Loss of Past, Present and Future Valuable Services;
 - ~ Requirement for Past, Present and Future Medical Care;
 - ~ Special Damages in an amount to be determined.

35. At the time of the accident, Elizabeth Tracy was not a Canadian citizen and consequently does not yet benefit from New Brunswick Medicare coverage. As such, liability for any and all medical-related expenses including physicians, nurses, hospitalization, extra mural care, etc., has thus far been borne by the Plaintiffs, Elizabeth and Shawn Tracy. These Plaintiffs, therefore, claim for Special Damages for past, present and future medical costs.
36. Should, however, Elizabeth Tracy be granted New Brunswick Medicare coverage, then any subrogated Medicare amount is claimed on its behalf.

Injuries of Shawn Tracy

37. As a direct result of being an eye witness to his wife's injury, the Plaintiff Shawn Tracy has suffered serious emotional upset. Shawn Tracy has incurred Special Damages in the form of Lost or Diminished Earnings because of the assistance required to help his wife in her extensive convalescence and rehabilitative process, full particulars of which are not known at this time.

Injuries of Elexi, Drew and Addison Tracy

38. The Plaintiffs Elexi Tracy, Drew Tracy and Addison Tracy have suffered serious emotional shock as a direct result of being an eye witness to their mother's injury, and as a result of having to witness the aftermath of her attempts to recover and rehabilitate from these injuries.

THE PLAINTIFFS' CLAIMS

39. The Plaintiff **Elizabeth Tracy** therefore claims against the Defendant as follows:
- (i) General Damages relating to pain and suffering, and loss of enjoyment of life;
 - (ii) General Damages for loss of future income and/or diminution of future earning capacity;
 - (iii) General Damages for past, present and future loss of valuable services;
 - (iv) General Damages for past, present and future medical care;
 - (v) Special Damages in an amount to be determined;
 - (vi) Subrogated New Brunswick Medicare claim, if applicable;
 - (vii) Interest on Special Damages;
 - (viii) Costs, Disbursements and HST;
 - (ix) Such further and other relief as this Honourable Court deems expedient and fair.

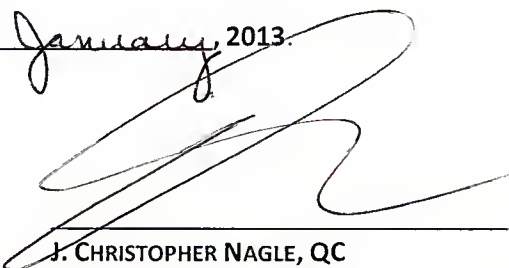
40. The Plaintiff **Shawn Tracy** therefore claims against the Defendant as follows:

- i. General Damages relating to pain and suffering, and loss of enjoyment of life;
- ii. General Damages for loss of past, present and future income and/or diminution of future earning capacity;
- iii. General Damages for past, present and future loss of valuable services;
- iv. General Damages for past, present and future medical care;
- v. Special Damages in an amount to be determined;
- vi. Subrogated New Brunswick Medicare claim, if applicable;
- vii. Interest on Special Damages;
- viii. Costs, Disbursements and HST;
- ix. Such further and other relief as this Honourable Court deems expedient and fair.

41. The Plaintiffs **Elexi Tracy, Drew Tracy and Addison Tracy**, by their Litigation Guardian, therefore claims against the Defendant as follows:

- i. General Damages relating to emotional upset, suffering, and loss of enjoyment of life.
- ii. Costs, Disbursements and HST;
- iii. Such further and other relief as this Honourable Court deems expedient and fair

Dated at Moncton, NB this 17th day of January, 2013.



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